

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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|----------------------------|---|----------------------------|
| WESLEY J. FELBER,          | ) |                            |
|                            | ) |                            |
| Claimant,                  | ) |                            |
|                            | ) |                            |
| v.                         | ) | <b>IC 2003-014732</b>      |
|                            | ) |                            |
| MOTIVE POWER,              | ) |                            |
|                            | ) |                            |
| Employer,                  | ) | <b>FINDINGS OF FACT,</b>   |
|                            | ) | <b>CONCLUSIONS OF LAW,</b> |
| and                        | ) | <b>AND RECOMMENDATION</b>  |
|                            | ) |                            |
| ZURICH NORTH AMERICAN      | ) |                            |
| INSURANCE COMPANY,         | ) | Filed: January 26, 2007    |
|                            | ) |                            |
| Surety,                    | ) |                            |
| and                        | ) |                            |
|                            | ) |                            |
| STATE OF IDAHO, INDUSTRIAL | ) |                            |
| SPECIAL INDEMNITY FUND,    | ) |                            |
|                            | ) |                            |
| Defendants.                | ) |                            |
| _____                      | ) |                            |

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on June 16, 2006. Andrew Schepp of Boise represented Claimant. Alan K. Hull of Boise represented Employer/Surety. Kenneth L. Mallea of Meridian represented State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted oral and documentary evidence. The record remained open for the taking of one post-hearing deposition, and the parties submitted post-hearing briefs. The matter came under advisement on November 28, 2006, and is now ready for decision.

## **ISSUES**

At hearing, the issues to be decided were:

1. Whether Claimant sustained a cervical injury from an accident arising out of and in the course of his employment;
2. Whether Claimant's cervical complaints are the result of a compensable occupational disease;
3. Whether Claimant's cervical condition is due in whole or in part to a pre-existing and/or subsequent injury or condition; and
4. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care; and
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD).

All other issues, including impairment, disability, and liability of the ISIF were reserved pending resolution of the causation issues.

## **CONTENTIONS OF THE PARTIES**

Claimant asserts that he sustained a herniated cervical disc as a result of lifting a bottle of argon welding gas onto his welding cart at work on October 8, 2003. As a result of this industrial injury, Claimant underwent a discectomy at C5-6, a foraminotomy, and a fusion with plate from C4 to C6. He is entitled to reimbursement for the medical care he has undergone as a result of the work injury, as well as TTDs for the time-loss he incurred as a result of the injury.

Employer/Surety contends that there was no industrial accident. Rather, Claimant asserted at the outset of this proceeding that his herniated cervical disc was an occupational disease that resulted from the repetitive cervical motion required by his job as a welder for Employer. Claimant maintained this position for two years and throughout discovery

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

proceedings. On August 4, 2005, Claimant filed an Amended Complaint asserting that his herniated disc was the result of an industrial injury that occurred on October 8, 2003. Employer/Surety asserts that Claimant or his counsel devised the claim of an October 8, 2003 industrial accident only after it became evident that Claimant's repetitive motion claim was not compensable under the Idaho Workers' Compensation Act.

ISIF argues that Claimant has abandoned his claim that he suffered from a compensable occupational disease and has failed to carry his burden of proving that he sustained an injury as a result of an industrial accident on October 8, 2003. In the absence of a compensable industrial injury, the statutory requirements of Idaho Code § 72-332 preclude any ISIF liability for Claimant's condition.

### **PROCEDURAL HISTORY**

The original Complaint that initiated this proceeding was filed on June 30, 2004 and alleged repetitive motion injuries to the neck and right wrist. Claimant's Complaint against ISIF was filed February 9, 2005, asserting the same repetitive motion injuries. At some point in the preparation for hearing, the parties limited the focus of this proceeding to the neck injury. Claimant maintained his repetitive motion claim through several rounds of discovery and until August 10, 2005, at which time he filed Amended Complaints against Employer/Surety and ISIF alleging that Claimant's cervical injury was the result of an industrial accident that occurred on October 8, 2003.

At hearing and in post-hearing briefing, Claimant's case was directed only to the issue of whether Claimant sustained a cervical injury from an accident in the course of his employment. Claimant made no further argument, and presented no evidence, in support of his original claim of a repetitive motion injury to his neck. Based on this procedural posture, the Referee deems

that Claimant waived any claim he might have had for an occupational disease or repetitive motion injury.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Theresa Felber, Robert Glazier, Katie Wilson and Shannon Purvis, taken at hearing;
2. Claimant's Exhibits A, B, D, E, G, J, L, M, and O through Q, admitted at hearing;
3. Defendants' Exhibits 1 through 24, admitted at hearing; and
4. Post-hearing deposition of Douglas E. Smith, M.D.

Objections interposed at pages 33, 34, 35, and 36 of Dr. Smith's July 26, 2006 deposition are sustained. All other objections of record in Dr. Smith's deposition are noted, but overruled. Objections interposed at pages 259 and 260 of Claimant's May 9, 2006 deposition are noted, but overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. At the time of hearing, Claimant was 45 years of age, and had just relocated to Oregon where he resided with his wife, Theresa.

#### ***PRIOR MEDICAL HISTORY***

2. On December 20, 2000, Claimant was injured in a motor vehicle accident (MVA). Claimant sustained an injury to his neck as a result of the accident, for which he was treated by Dr. Douglas Smith.
3. A post-accident MRI showed moderately advanced degenerative disc disease at

C4-5, including central canal stenosis, broad disc ridge complex, and kyphosis that together resulted in moderate flattening of the spinal cord. Additionally, the MRI showed milder degenerative changes at C5-C6, including a broad disc ridge complex, more prominent on the right, and some right neural foraminal narrowing.

4. Following an extended trial of conservative treatment, Dr. Smith performed a C4-5 discectomy, foraminectomy, and fusion with plate in August 2001.

5. Dr. Smith's records indicate that Claimant made a slow recovery, attributed in part to his on-going tobacco abuse, but was eventually released to return to work on February 11, 2002.

#### ***WORK HISTORY WITH EMPLOYER***

6. Employer builds new locomotives and rebuilds older ones. Claimant started to work for Employer in April 1992. Claimant was laid off for extended periods of time during his years of employment with Employer. During the periods he was laid off, he would find other construction work, returning to Employer when recalled. He was employed as a welder or fabricator, and performed a variety of welding tasks as part of his job. Claimant's work for Employer was physically demanding.

7. Claimant was working for Employer when he was involved in his December 2000 MVA. Shortly after the accident, Claimant was laid off in a routine lay-off and was not recalled until the spring of 2002, a period which encompassed almost his entire recovery period from the first cervical surgery. He was released to return to work in February 2002, and was recalled to work in May 2002.

8. Upon being recalled, Claimant returned to the same job he held prior to his MVA. He was able to perform his duties for Employer despite his previous cervical injury and surgery.

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5**

until the fall of 2003 when he began to experience numbness and tingling in his right arm and began having difficulty grasping things with his right hand. Claimant continued working until he underwent a cholecystectomy on October 16, 2003. He took a week off work to recover, then returned to his position with Employer. In November, Employer instituted a temporary lay-off, which included Claimant's position.

#### ***CHRONOLOGY OF EVENTS—OCTOBER 2003 THROUGH APRIL 2005***

9. The first medical record to discuss complaints of numbness in the right upper extremity is on November 4, 2003. Claimant presented to David Ballance, M.D., his regular medical provider, complaining of numbness in his right hand and thumb with general weakness in his right shoulder. Claimant specifically denied any recent trauma. Dr. Ballance ordered an MRI which showed, in addition to the post-operative changes at C4-5, a broad-based right-sided disc herniation with thecal sac deformity at C5-6. Claimant was referred back to Dr. Smith.

10. Claimant saw Doug Casperson, Dr. Smith's physician's assistant, on December 8, 2003. Claimant reported that "approximately 1 1/2 months ago he started having right arm weakness and pain." Defendants' Ex. 4, p. 30. Mr. Casperson suspected a C5-6 disc herniation, but because of the existing metal plate at C4-5, Dr. Smith ordered electrodiagnostic testing to confirm or rule out radicular symptoms. The testing showed both a C6 radiculopathy and right carpal tunnel syndrome (CTS).

11. On the same date, December 8, Claimant filled out a "Workers' Compensation Questionnaire" (Defendants' Ex. 1, p. 2). As to the date and time of the incident, Claimant wrote "Nov, 03 morning." At the bottom of the page is the following question: "If this is a gradual onset injury, when did you first notice symptoms?" Claimant wrote "End Oct, 003 [sic]." Claimant also stated that he told his supervisor, Robert Glazier, about his right side upper

extremity weakness and the numbness in his hands ÚNov. 003, morning [sic].Ú *Id.*, at p. 3.

12. On January 13, 2004, Dr. Smith surgically removed the old hardware at C4-5, performed an anterior cervical discectomy and fusion at C5-6, inserted a bone graft and implanted an anterior plate spanning C4-C6. At the same time, Dr. Smith performed a right carpal tunnel release.

13. Claimant's recovery was slow (he continued to abuse tobacco, despite warnings from his doctors that it could impede a solid fusion of his cervical spine) and was complicated by another MVA that occurred approximately six weeks after his surgery. He injured his right shoulder in the accident, but his two-level fusion was not compromised.

14. On March 12, Surety recorded an interview with Claimant and his attorney. When asked how Claimant believed he had sustained his cervical injury, he responded that it was due to repetitive motion, Ú . . lifting, you know, twisting and wearing a hood all day, flipping it up and down. Swinging hammers, making everything fit.Ú Defendants'Ex. 17, pp. 6, 8-9.

15. On March 22, 2004, Dr. Smith wrote Surety regarding the need for Claimant's second cervical surgery. He noted that a fusion creates a greater mechanical strain on the joints above and below the fusion. When he performed Claimant's first fusion, Dr. Smith believed that the C5-6 level was adequate to support the additional mechanical stress of the C4-5 fusion, despite some degenerative abnormalities. Dr. Smith opined:

. . the C5-6 level was not strong enough to withstand the additional mechanical stress and gradually failed.

At this point, I view the need for the C5-6 disc surgery to be primarily due to the motor vehicle accident of 12/20/02, and secondarily related to the mechanical stress of the surgery at C4-5.

Defendants'Ex. 4, p. 43. Surety denied Claimant's claim on March 29, 2004, based on Dr. Smith's March 22 causation letter.

16. In a post-surgical follow-up appointment on April 19, 2004, Dr. Smith noted:

[Claimant] is worried that the mechanical failure of his fusion had to do with heavy, physical work. I will review his file and my letter to [Surety] with that in mind, then call [Claimant's counsel].

Defendants' Ex. 4, p. 51. On April 26, 2004, Dr. Smith received a telephone call from Claimant's counsel, John Croner. According to the note describing the conversation, Mr. Croner was going to talk to Claimant and obtain a more detailed historical chronology of events and then get back with Dr. Smith. An April 27 letter to Dr. Smith from Mr. Croner stated that he had met with Claimant and had obtained a more definitive chronology of events. Mr. Croner advised Dr. Smith that Claimant made a full recovery from the first fusion and returned to the type of work he had always done— heavy duty welding, fabrication, and related jobs which placed a great deal of stress on his neck region. Defendants' Ex. 12, p. 16. Mr. Croner further stated:

His [Claimant's] welding helmet (hood) is quite heavy.<sup>1</sup> The repetitive flipping of the hood back to examine his work placed continual stress on his neck, and in November, 2003, his discomfort and pain in the C5-6 region reached a level such that he sought medical assistance from his family physician, Dr. Balance [sic].

*Id.*, (emphasis in original). Mr. Croner concluded by asking Dr. Smith to reconsider whether the repetitive stress of flipping the heavy welding hood up and down might not have caused the failure of C5-6, noting that if it were Claimant's work that caused the subsequent herniation, he should be eligible for workers' compensation benefits.

17. By letter dated May 8, 2004, Dr. Smith advised Surety that he had reviewed his records and had also received additional information from Mr. Croner. Based in part on information received from Mr. Croner about the nature of Claimant's work and the repetitive flipping of his heavy welding hood, Dr. Smith changed his opinion as to what caused Claimant's need for a second fusion surgery, stating:

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<sup>1</sup> In fact, the welding hood weighed two pounds or less.



. . . I will change my opinion to say that I believe that it is more likely than not that [Claimant's] work, rather than the [12/20/00] motor vehicle accident, was the major contributing cause to his need for the anterior cervical discectomy and fusion at the C5-6 level.

Defendants' Ex. 4, p. 54.

18. A Workers' Compensation Complaint dated June 25, 2004, was filed with the Commission on June 30, alleging a repetitive motion injury to Claimant's neck.

19. On August 13, 2004, Claimant, through his counsel, filed answers to Defendants' first set of interrogatories. Interrogatory 1 asked for the names and addresses of all persons who were witnesses to Claimant's accident. Claimant responded, "Claimant does not allege there was an accident. Claimant alleges that he acquired two compensable occupational diseases from repetitive motion." Defendants' Ex. 23, pp. 1-2. Claimant continued to deny that an accident occurred throughout the remainder of the Interrogatories. Claimant, under oath, averred that he had read the answers, understood their contents and that they were true and correct to the best of his knowledge.

20. On September 1, 2004, Claimant met with Nancy J. Collins, Ph.D., a vocational consultant retained by Claimant. Dr. Collins was asked to prepare a vocational assessment of Claimant's current employability and future vocational disability as a result of his C5-6 herniation caused by repetitive motion while working for Employer.

21. On February 9, 2005, Claimant filed a Complaint against ISIF. Attached to the ISIF Complaint was a copy of the June 2004 Complaint alleging repetitive motion injuries to Claimant's neck and wrist.

22. On March 17, 2005, Claimant served answers to ISIF's first set of interrogatories. Claimant maintained throughout his answers that there had never been any accident, and that his herniated disc and his right CTS were both the result of repetitive motion while working for

Employer. Claimant signed the answers under oath, stating that he read them, understood them, and that they were true.

23. On the same date, Claimant met for the first time with Shannon Purvis, rehabilitation consultant with the Industrial Commission Rehabilitation Division. Notes from Ms. Purvis's file include Claimant's explanation that he believed his cervical injury was the result of the repetitive motion of flipping the face shield up and down while welding.

24. Claimant was deposed on April 5, 2005. Throughout his deposition, Claimant asserted that the numbness in his right arm and hand and the weakness in his right shoulder came on gradually, over a period of a month or so. Claimant's Deposition, April 5, 2004, pp. 169, 180. Claimant confirmed that he had specifically denied a traumatic event when he first saw Dr. Ballance. *Id.*, at p. 176. Claimant's deposition was lengthy, and was continued to an unspecified future date.

25. Dr. Smith was deposed on April 27, 2005. The entire deposition was premised on Claimant's assertion of a repetitive motion injury. Counsel for Defendants both focused on Dr. Smith's two different causation opinions, asking Dr. Smith to elaborate on the differences between a wear and tear failure at C5-6 versus a work-related repetitive motion injury. During his deposition, Dr. Smith reiterated that nothing in his records reflected that Claimant had ever suffered any acute trauma or accident that could have caused the C5-6 herniation.

#### ***CHRONOLOGY OF EVENTS—AUGUST 2005 THROUGH HEARING***

26. On August 10, 2005, Claimant filed amended complaints against both Employer/Surety and ISIF. The amended complaints identified a repetitive wrist injury that manifested on October 8, 2003, and an accident on the same date (lifting a tank of argon gas onto a welding cart) that caused the herniated disc in Claimant's cervical spine at C5-6.

27. Dr. Smith testified in his post-hearing deposition that on April 26, 2006, he was visited by four attorneys who were working on Claimant's behalf (Messrs. Brady and Croner and two other unnamed individuals). Dr. Smith testified that the attorneys advised him that Claimant's cervical injury had been the result of a work accident where he was lifting a bottle of welding gas. This was the first time that Dr. Smith heard about an industrial accident in relation to Claimant's cervical injury.

### ***Claimant's Deposition***

28. Claimant's deposition was resumed and completed on May 9, 2006. He testified that on October 8, 2003, he was working outside the main fabrication shop where aluminum and stainless steel were welded. He was working on a door that would provide access to the engine compartment of a locomotive. Because he was outside the main fabrication area, Claimant used a portable welder and bottled gas. About 10:00 that morning, he ran out of argon gas. The empty bottle had to be lifted off the welding cart and replaced with a full bottle. The bottles are large, in excess of five feet in height, and probably weigh in excess of seventy pounds when full. Claimant testified that he put both arms around the full bottle, and when he lifted it to place it on the welding cart, he experienced a snap in his neck and pain down the center of his spine and then a burning pain down his right arm. The neck pain lasted about five seconds. The right arm pain lasted a bit longer, then his arm became numb for a minute or so, and then the symptoms receded, leaving Claimant feeling a general weakness in his right upper extremity.

29. Claimant testified that he continued to work after the incident. Later that afternoon, Claimant had difficulty gripping tools with his right hand. He testified that he told his supervisor, Robert Glazier, about his difficulty holding onto his tools. Claimant also testified that he told Mr. Glazier about the bottle lifting incident.

30. Claimant testified that he sought medical care from Dr. Ballance the same week, and advised Dr. Ballance about the incident on October 8. Claimant stated that when he first saw Dr. Smith for his new injury, he told the doctor all about the incident on October 8.

31. Claimant was questioned extensively about the workers' compensation questionnaire he filled out for Employer. Defendants' Ex. 1, pp. 2-7. Claimant verified that he had filled out the form except for a portion that had been added by his wife and one sentence that appeared on page four of the document. Claimant explained that he wrote "November 3 morning" in the blank following "Date and time of incident" because it was the date of his doctor's appointment and the first date that he filled out any paperwork about the incident.<sup>2</sup> Claimant averred that the reason he wrote "End of October 3" in the blank following "If this is a gradual onset injury, when did you first notice symptoms?" was because he still had upper extremity symptoms following his gall bladder surgery in mid-October.

### ***Hearing Testimony***

32. At hearing, Claimant testified that the sharp pain he felt in his neck and down his back when he lifted the argon bottle lasted a minute or two, and that the numbness and tingling in his right arm lasted just a little bit longer. Claimant reiterated his deposition testimony that he told Robert Glazier about not being able to hold onto tools, but did not recall whether he told Mr. Glazier about the bottle lifting incident.

33. Claimant testified that he had not seen the Supervisor's Accident Investigation Report, Defendant's Ex. 1, p. 5, until sometime after his first deposition, and it was this document that reminded him of the exact date of the bottle lifting incident.

34. At hearing, Robert Glazier testified that sometime around the end of September or

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<sup>2</sup> Claimant actually filled out the questionnaire in question on December 8, 2003.

the beginning of October 2003, Claimant had complained to him about not being able to grip his tools with his right hand. The witness had no recollection of being told about the bottle lifting incident that allegedly precipitated Claimant's inability to grasp his tools.

## **DISCUSSION AND FURTHER FINDINGS**

### ***CREDIBILITY***

35. Witness credibility is of paramount importance in deciding this case. The Claimant's alleged accident was not witnessed, verbal notice was minimal, no investigation was conducted, and written accident reports were not contemporaneous. It was patently evident at hearing that Claimant was a poor historian, but one can be a poor historian and still be a credible witness. In this proceeding, Claimant lacked both historical perspective and any shred of credibility. Whether Claimant was an active participant in constructing his story, or allowed himself to be led to embrace a set of facts that would support his claim, or passively permitted his legal counsel to misrepresent events, remains unclear. What is clear to the Referee is that the story about an accident on October 8, 2003 is historical fiction at best, and fantasy at worst. In support of her finding that Claimant is not credible, the Referee points to the following factors, which are but a soupçon of what appears in the record.

36. From approximately December 8, 2003, the time that Claimant learned that he had a herniated disc at C5-6, until sometime in August 2005, Claimant asserted, repeatedly, and under oath, that his herniated disc was the result of repetitive motion injury.

Surety Interview. Claimant, while in the presence of his attorney, was interviewed by Katie Wilson, an adjustor for Surety as part of the investigation of the claim. Claimant told Ms. Wilson that he attributed his injuries (both cervical and wrist) to the repetitive motion inherent in his work.

Complaints. Claimant allowed the filing of two complaints that alleged a repetitive motion injury in his neck and wrist.

Answers to Interrogatories. Claimant, under oath, testified to the truth of the answers to two sets of interrogatories that specifically stated, "Claimant does not allege there was an accident. Claimant alleges that he acquired two compensable occupational diseases from repetitive motion." Defendants' Ex. 23, pp. 1-2.

Deposition. In his first deposition, under oath, Claimant repeatedly asserted that the pain in his neck and right arm came on gradually.

Accident Report. When Claimant first reported his medical problem to his supervisor, he failed to mention anything about a sudden onset of pain while lifting a bottle of welding gas, but rather told Robert Glazier that he was having trouble holding onto his tools. When Claimant filled out the Employer's questionnaire, he made no mention of a sudden onset of pain while lifting a bottle of welding gas.

Medical Records. When Claimant first saw a doctor about his neck and right arm pain, nearly a month after the alleged October 8 incident, he made no mention of a sudden onset of pain while lifting a bottle of welding gas. In fact, when Dr. Ballance specifically inquired whether there was any accident or traumatic event associated with the onset of the pain, Claimant denied any traumatic incident. When Claimant first returned to Dr. Smith's office and saw P.A. Casperson, he made no mention of a sudden onset of pain while lifting a bottle of welding gas. Three weeks later, when Claimant saw Dr. Smith himself, he made no mention of a sudden onset of pain associated with lifting a bottle of welding gas.

Dr. Smith's Causation Opinion. Shortly after Dr. Smith opined that Claimant's C5-6 herniation and need for a second fusion was the result of his 2000 MVA and the additional stress

that his first fusion placed on an already compromised cervical disc, Claimant pointedly inquired whether the repetitive stress of his hard physical labor could have caused the first fusion to fail. Claimant's counsel pursued the issue with Dr. Smith. Thereafter, Claimant's counsel assured Dr. Smith that he had *thoroughly* reviewed the facts and chronology of the case with Claimant, advised Dr. Smith of the additional information regarding Claimant's welding hood, and asked Dr. Smith to reconsider his causation opinion.

ICRD Interview. When Claimant first met with Shannon Purvis, ICRD consultant, he told her that he believed that his neck injury was the result of the repetitive motion that was part and parcel of his job with Employer.

37. Once Claimant and his counsel changed course and abandoned the repetitive injury claim in favor of an accident and injury claim, Claimant had some explaining to do. In his continued deposition and in his testimony at hearing, Claimant endeavored to explain away the version of events that he had spent the past two and a half years building. Even counsel's frequent use of leading questions could not pilot Claimant safely through that minefield.

Claimant Told Everyone About the Gas Bottle. Claimant's assertion that he told everyone involved in this proceeding about the bottle lifting incident from the outset, including his attorneys, does not square with the written and testimonial record. Claimant could not explain why no mention of the incident appeared in any of the written records, why none of the individuals who provided evidence in this proceeding recalled having heard of the lifting incident, and why he and his attorneys pursued a repetitive motion claim for more than two years.

Refreshed Memory. At hearing, Claimant asserted that while he had always been aware of the bottle lifting incident and its connection with the onset of his symptoms, it was not until he

saw the supervisor's investigatory report (Defendant's Ex. 1, p. 5) that he was reminded of the exact date of the incident. This explanation is not persuasive. It defies logic, and is contrary to the experience of this Referee, that a claimant would fail to mention that there had been an incident associated with the onset of his or her symptoms simply because the individual could not remember the exact date of the incident.

Questionnaire. During questioning by his own counsel, Claimant attempted to explain away certain portions of the workers' compensation questionnaire that he completed for Employer on December 8, 2003 (Defendants' Ex. 1). When asked to explain why he wrote "November 3, 2003 morning" as the date and time the injury happened, he replied that it was because that was the date he first saw a doctor. When asked to explain why he wrote "end of October" in response to a question about when he first noticed the *gradual onset* of his symptoms, he replied that he was told that his neck and arm symptoms could be related to his gall bladder problems, but they persisted after he had recovered from gall bladder surgery at the end of October.<sup>3</sup> If, as Claimant asserted at hearing, he knew he had a lifting accident and knew that his neck and arm complaints started at that time, why would he ever think they were caused by his gall bladder?

### ***ACCIDENT/INJURY***

38. In an industrial accident case, the burden is upon the claimant to prove that he sustained an *injury* as a result of an *accident* that occurred within the course of his employment. "Injury" is defined by Idaho Code § 72-102(17)(c) as an injury caused by an accident, resulting in violence to the physical structure of the body. "Accident" is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it

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<sup>3</sup> Nothing in the medical records indicates that any medical professional told him that his neck and arm symptoms could be related to his gall bladder.



occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b).

39. Claimant has failed to carry his burden of proving that an accident, as defined by statute, occurred on October 8, 2003 and that Claimant was injured as a result. Proof that an accident occurred depends entirely upon the testimony of Claimant, which has been found not credible.

### **CONCLUSIONS OF LAW**

1. Claimant has failed to carry his burden of proving that he sustained a cervical injury from an accident arising out of and in the course of his employment;

2. All other issues are moot.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 17th day of January, 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of January, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

ANDREW E SCHEPP  
PO BOX 1398  
BOISE ID 83701-1398

ALAN K HULL  
PO BOX 7426  
BOISE ID 83707-7426

KENNETH L MALLEA  
PO BOX 857  
MERIDIAN ID 83680

djb

/s/\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

|                            |   |                         |
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| and                        | ) | <b>ORDER</b>            |
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| STATE OF IDAHO, INDUSTRIAL | ) |                         |
| SPECIAL INDEMNITY FUND,    | ) |                         |
|                            | ) |                         |
| Defendants.                | ) |                         |
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Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to carry his burden of proving that he sustained a cervical injury from an accident arising out of and in the course of his employment;

2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 26th day of January, 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_

James F. Kile, Chairman

/s/\_\_\_\_\_

R.D. Maynard, Commissioner

/s/\_\_\_\_\_

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/\_\_\_\_\_

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of January, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

ANDREW E SCHEPP  
PO BOX 1398  
BOISE ID 83701-1398

ALAN K HULL  
PO BOX 7426  
BOISE ID 83707-7426

KENNETH L MALLEA  
PO BOX 857  
MERIDIAN ID 83680

djb

/s/\_\_\_\_\_